INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 355

W. O. BROWNE, E. W. NEGLEY, M. J. DOBSON, MERRILL NEWMAN, MORRIS J. NEWMAN, AND BEN T. STOWELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 1183–1188, 1189) is reported *sub nom. Mansfield et al.* v. *United States* at 155 F. 2d 952.

JURISDICTION

The judgment of the circuit court of appeals was entered May 23, 1946 (R. 1188), and a petition for rehearing (R. 1190–1192) was denied July 2, 1946 (R. 1193). The petition for a writ

of certiorari was docketed August 2, 1946, 31 days after the entry of the order of the circuit court of appeals denying a rehearing. The Government thereupon filed a memorandum suggesting that the petition should be denied for want of jurisdiction because it was not filed within the 30-day period allowed by Rule 37 (b) (2) of the Federal Rules of Criminal Procedure (see also Rule 45 (a)). Thereafter, one of the attorneys for petitioners filed an affidavit showing that the petition was actually delivered by the Railway Express Agency, Inc., at the Supreme Court building on August 1 at 4:00 p. m. In view of this fact, we do not now contest the timeliness of the petition.

QUESTIONS PRESENTED

1. Whether petitioners' convictions of conspiracy to violate the mail fraud statute and the Securities Act in the sale of alleged oil lands by representing, *inter alia,* that the land was being exploited for oil, are invalid on the grounds (a) that such sales were not sales of "securities" within the meaning of the latter statute, and (b) that petitioners did not realize at the time that the sale of securities was involved, within the holding of a subsequent decision of this Court.

2. Whether petitioners' convictions on count 1 should be reversed on the ground of inconsistency in the verdict.

3. Whether petitioners could be properly convicted and punished for the separate offenses of mail fraud and conspiracy to commit mail fraud where they did not participate directly in the substantive offense but were chargeable therewith as parties to a conspiracy which contemplated such activity.

4. Whether the trial court erred in admitting in evidence a map displayed by a salesman who was not indicted which misrepresented development aspects of the land involved in the conspiracy, and in instructing the jury that they could consider this evidence on the question of the defendants' good faith.

STATUTES INVOLVED

The Securities Act of 1933 as amended (c. 38, title 1, 48 Stat. 74, 905) provides in pertinent part as follows:

> Sec. 2. (1) [15 U. S. C. 77b (1)] The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guar-

antee of, or warrant or right to subscribe to or purchase, any of the foregoing.

* * * * *

Sec. 17. (a) [15 U. S. C. 77q (a)] It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

* * * * *

Sec. 24. [15 U. S. C. 77x] Any person who willfully violates any of the provisions of this title, * * * shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * *

shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, * * * or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

An eleven-count indictment was returned in the District Court for the Western District of Texas on August 8, 1944, charging that petitioners and others, including Frank Mansfield and L. A. Thigpen, had conceived and executed a scheme to defraud investors in the sale of alleged oil lands, in violation of the mail fraud statute (Cr. Code, § 215) and the fraud provisions of the Securities Act of 1933 (§ 17 (a)) (R. 6–47). Counts 1–5 were based on the mail fraud statute (R. 7–23), counts 6–10 on the Securities Act (R. 23–45), and count 11 charged a conspiracy

to violate both statutes (R. 45–46). The jury found petitioners guilty on counts 1 and 11 and acquitted them on counts 2 through 10 (R. 150–152); Mansfield was acquitted on count 1 and convicted on counts 2 through 11 (R. 149). Petitioners were each sentenced to pay a fine of $1,000 and to imprisonment for three years on count 1, and to imprisonment for 15 months on count 11, the imprisonment sentences to run consecutively (R. 158). On appeal to the Circuit Court of Appeals for the Fifth Circuit, the convictions were affirmed (R. 1188).

The evidence in support of the convictions may be briefly summarized as follows:

In March 1938, Mansfield made arrangements to purchase from the Central Securities Company, of San Antonio, Texas, parcels of a 20,640-acre tract of land located in Brewster County, Texas. The oral agreement made at that time was that Central would sell parcels from the tract to Mansfield at $1.50 per acre and execute deeds as he paid for it.[1] This was not an exclusive arrangement, and Central, at various times, sold sizeable parcels to other people at the same price (R. 241–257). Shortly after entering into this agree-

[1] The evidence showed that Mansfield purchased a total of 3,840 acres from Central, which were resold to investors in pursuance of the scheme. It also showed that 228 spurious deeds purporting to convey an additional 4,765 acres were given to investors for acreage which Mansfield had never purchased from Central or which he had previously sold to others. (See R. 243–244, 452–453, 482, 486.)

ment with Central, Mansfield met Thigpen in San Antonio and they made an arrangement whereby Thigpen was to establish an office in Los Angeles, California, under the name of Interstate Realty Company for the purpose of selling the Brewster County land (R. 870–871). Petitioners were active as salesmen or promoters in that enterprise (Browne—R. 871, 385, 402, 413, 529, 788; Negley and Dobson—R. 566, 629, 630, 642, 643, 665, 678, 702, 704, 735, 739, 742, 744; Morris J. and Merrill Newman—R. 492–493, 570, 632, 643, 666–667, 679, 742, 747, 779; Stowell—R. 397, 601–603, 630, 632, 871).

The gist of the scheme was to sell the Brewster County land to California investors on the representation that it was valuable oil land. To impress investors that this was true, Thigpen conducted drilling operations which produced no oil and were finally abandoned (Gov. Exs. 91, R. 1101; 92, R. 1103–1104). Some investors were shown pictures of these alleged test wells (see, e. g., R. 273, 414). In addition, investors were often shown maps purporting to depict the geological structure of the land and potential oil deposits (see, e. g., Gov. Exs. 5, R. 274–275, 1030; 14, R. 295–296, 1038; 34, R. 383–384, 1054; and R. 550, 619, 744). To give the maps an appearance of authenticity, they bore a legend indicating that they had been prepared by certain experts of the University of Texas (*ibid.*). One of these ex-

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perts, Dr. E. H. Sellards, denied the authenticity of the maps (R. 344–345) and the truth of the information recorded thereon as to the location of oil structures and operations (R. 340–351). His testimony as to the falsity of the information on the maps was corroborated by another expert (R. 839–841). The evidence further showed that Thigpen's drillings were not based upon geological information and that discovery of oil would have been purely fortuitous (R. 359, 1117); that the structural formation of the land and its surface geology definitely negated any prospect of discovering oil (R. 357–361, 1117); that the land is remote and inaccessible except by foot or horseback and is practically uninhabited (Gov. Ex. 56, at R. 1076–1077); and that the nearest oil producing land is approximately 140 miles distant (R. 845, 941).

This land, purchased from Central at $1.50 per acre, was sold by petitioners to California investors at $20 per acre in almost every instance (see, e. g., R. 386, 529, 602, 681, 705, 725, 738, 808), and petitioners received commission of 40 to 50 per cent (R. 872). The sales plan utilized by the defendants was the commonly known "reloading scheme"; that is, the object was to induce the same investor to make several purchases. That object was effected as follows: One of the petitioners would sell an investor a few acres, representing that major oil companies were drilling in close proximity to the land (see, e. g.,

R. 375–376, 471–472, 488, 618, 631, 640, 642); that there was a great deal of leasing activity in that area by certain major companies (see, e. g., R. 534, 550); or that the Brewster County tract was about to come into production, that the major companies were interested in it and would soon be drilling on the tract, and that within a matter of weeks the investor would receive a bonus of several hundred dollars per acre and oil royalties (see, e. g., R. 488, 492, 522, 632, 665–667, 686, 727, 737, 743, 779). These representations were shown to be completely false by the testimony of officials of three of the major oil companies named by petitioners (see R. 839–845, 859–860, 960). References to the Thigpen drilling operations and the maps were also important phases of the sales program. (See p. 7, *supra*.)

After an initial sale had been thus effected, further sales to the same investor were accomplished by one of several techniques. One device was to have a salesman call upon an investor and introduce himself as the representative of a major oil company which, on the basis of extensive study of the area for oil prospects, desired to acquire large tracts of the Brewster County land. He would show the investor an apparently genuine check for thousands of dollars which he stated the company would pay the investor as a bonus for a lease of his land. The salesman would leave his name and address in the event the investor desired to contact him. Then, on inquiry

by the investor, the initial salesman or another would sell the investor additional acreage; the investor could not thereafter locate the oil company representative. (See, e. g., R. 267–271, 371–386.) Another device was for petitioners to represent to an investor that certain New York interests were about to "block up" a large number of leases on the Brewster County land and that very shortly a large "cash distribution" would be made to investors who had large blocks taken up by the New York groups. The investor was urged to buy sufficient acreage so that he could participate. After the investor bought additional acreage, he was never approached by any member of the alleged New York group or anyone else with offers to lease his land. (See, e. g., R. 492–496, 570–571.) A variation of the latter device was to persuade the investor to make further purchases on the representation that larger blocks were necessary to participate in a proposed "community lease" (see, e. g., R. 630, 640, 643, 657, 704–711).

ARGUMENT

1. Petitioners do not question the sufficiency of the evidence to support their convictions. They contend, first, that they could not properly be tried and convicted of conspiracy to violate the Securities Act (count 11), because (a) they sold only land and not securities, and (b) they could not have intended to sell securities in violation of

the Act, since it was not known that the interests they sold constituted securities until the later decision of this Court in *S. E. C.* v. *Joiner Corp.*, 320 U. S. 344 (Br. 5–7, 15–24). Assuming, for the moment, that petitioners' contentions as to the inapplicability of the Securities Act are correct, their convictions on count 11 are nevertheless valid. That count charged a conspiracy to violate the mail fraud statute as well as the Securities Act. Since that conspiracy was based upon projected use of the mails and not upon use of other instrumentalities of interstate commerce, the jury would have had to find, in order to find petitioners guilty of conspiracy to violate the Securities Act, that the conspiracy contemplated (1) use of the mails, (2) fraud to which the use of the mails was related, and (3) sales of fraudulent securities by use of the mails. Proof of a conspiracy to violate Section 17 (a) of the Securities Act thus involved proof of the identical elements required to establish a conspiracy to violate the mail fraud statute, with the addition of a third element, i. e., proof of the contemplated sale of securities. See *United States* v. *Rollnick,* 91 F. 2d 911, 918 (C. C. A. 2); *United States* v. *Montgomery,* 21 F. Supp. 770 (D. N. Mex.); *United States* v. *Alluan,* 13 F. Supp. 289, 291 (N. D. Tex.). It is obvious, therefore, that in finding petitioners guilty on count 11, the jury necessarily must have found, at least, that they were guilty of conspiracy to violate the mail fraud statute.

In addition, it is clear, within the controlling authority of the *Joiner* case, that the transactions here involved the sale of "investment contracts" within the definition of a "security" in Section 2 (1) of the Securities Act, *supra,* pp. 3–4. The sales of the land were accompanied by various representations that the sellers were drilling for oil, that large oil companies were interested in exploitation work on the land, and that the investors would earn large profits in bonuses and royalties from these activities and from their participation in enterprises engaged in blocking large tracts of the land for exploitation or resale. Thus, the record shows that the investors were induced to purchase the land, not for its value *per se* or for use or development by their own efforts, but rather because of the profits that were held out to them if they participated in the larger enterprises for the exploitation or resale of the land. This participation for the profit to be made in enterprises conducted by others gave the transactions all the characteristics of an investment contract in the same measure as did the transactions in the *Joiner* case. See also *Securities and Exchange Commission* v. *Howey Co.,* No. 483, O. T. 1945, decided May 27, 1946. Cf. pp. 41–43 of the Brief for the United States in Opposition in *Baker et al.* v. *United States,* Nos. 484–486, O. T. 1946, certiorari denied October 28, 1946.

The burden of petitioners' argument on this point is directed to the contention that at the time of their activities they did not know their

transactions involved the sale of securities, and that to apply the later decision of this Court in the *Joiner* case would result in an *ex post facto* conviction. Petitioners further argue that in a criminal prosecution, as distinguished from a civil action in which the burden of proof is less stringent, the Government must establish beyond a reasonable doubt that the transactions involved securities. We submit that this burden of proof was sustained, and that there was sufficient evidence from which the jury could have concluded beyond a reasonable doubt that petitioners conspired to and did sell securities within the intendment of the Act. In any event, petitioners misconceive the requirements of proof in a criminal prosecution based upon Section 17 (a) of the Securities Act. Under that provision, the Government must establish that a defendant (1) by use of the mails or other instrumentalities of interstate commerce, (2) in the sale of securities, (3) employed a device, scheme, or artifice to defraud. Since the statute is primarily directed against fraud, the intent that must be established is the intent to defraud. Cf. *Blue* v. *United States,* 138 F. 2d 351, 358–359 (C. C. A. 6), certiorari denied, 322 U. S. 737; *Silkworth* v. *United States,* 10 F. 2d 711, 719 (C. C. A. 2), certiorari denied, 271 U. S. 664; *Newingham* v. *United States,* 4 F. 2d 490, 492 (C. C. A. 3), certiorari denied, 268 U. S. 703; *Kasle* v. *United States,* 233 Fed. 878, 882 (C. C. A. 6). The question

whether a security is involved is a question of law for the court's determination (note R. 1003–1005) and is objectively determined from all the circumstances. Cf. *Blumenthal* v. *United States,* 88 F. 2d 522, 528 (C. C. A. 8). Thus, even assuming that petitioners did not unequivocally understand that their activities involved the sale of securities, their convictions on count 11, in so far as they are predicated upon a conspiracy to violate the Securities Act, are proper, since (a) as a matter of law they sold securities, and (b) there was proof beyond a reasonable doubt that in the sale of these securities by use of the mails they employed a scheme to defraud. In any event, it is patent that petitioners, experienced in the oil investment business, at least had reason to believe that the interests they sold might be held to be securities, so that their intent to violate the Securities Act could be justifiably inferred. As Justice Holmes said in *United States* v. *Wurzbach,* 280 U. S. 396, 399:

> * * * we imagine that no one not in search of trouble would feel any. Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. *Nash* v. *United States,* 229 U. S. 373.

See also *Horning* v. *District of Columbia,* 254 U. S. 135, 137; *McGunnigal* v. *United States,* 151 F. (2d) 162, 165–166 (C. C. A. 1), certiorari denied, 326 U. S. 776.

2. Petitioners contend that in acquitting the principal promoter, Mansfield, on count 1 and finding them guilty thereon, the jury showed such inconsistency and misunderstanding that its verdict cannot stand (Br. 7–8, 25–29). Admittedly, it is difficult to reconcile the verdict in this respect. And it is true that in *Speiller* v. *United States,* 31 F. (2d) 682, 683–684, upon which petitioners rely, the Circuit Court of Appeals for the Third Circuit held that an inconsistent verdict cannot stand. However, as pointed out in that decision, most of the other circuit courts of appeal had taken a different view. The question was decisively settled in favor of the latter view by the subsequent decision of this Court in *Dunn* v. *United States,* 284 U. S. 390, where it was stated (p. 393):

> Consistency in the verdict is not necessary. * * * As was said in *Steckler* v. *United States,* 7 F. (2) 59, 60:
>
> "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no

right to exercise, but to which they were disposed through lenity."

3. Petitioners also contend that since their convictions on count 1 (the substantive offense of mail fraud) and count 11 (conspiracy to commit the substantive offenses) were predicated solely on evidence of their participation in the scheme to defraud and there was no separate evidence showing that they were directly connected with the transactions on which count 1 was predicated, their convictions and sentences on both counts constitute double punishment (Br. 8–9, 29–32); and that they could not be convicted of the substantive offense solely on evidence of their connection with the conspiracy, without further proof that they participated directly in the mailing on which that count was based (Br. 9–10, 33–36). In short, the contentions go to the propriety of convictions of conspiracy and the objective offense where both are bottomed solely on proof of the conspiratorial connection. Whatever doubts there may previously have been as to the legality of such a prosecution and sentence, they have been dissipated by the decision of this Court in *Pinkerton* v. *United States,* rendered June 10, 1946, No. 719, O. T. 1945, where convictions and separate sentences for substantive offenses under the Internal Revenue Code and for conspiracy to commit those offenses were affirmed, even though as to one of the petitioners the convictions were based solely on his conspira-

torial connection and he was not shown to have participated directly in the commission of the substantive offenses. Nor does the instant case fall within the exception noted in the *Pinkerton* decision (slip opinion, p. 2), where the conspiracy is merged in the substantive offense because the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. It was not indispensable to the proof of the scheme charged in count 1, as it was to proof of the conspiracy charged in count 11, to show an agreement between two or more persons, because the substantive offense could, within the requirements of the mail fraud statute, have been the product of a single mind. Moreover, proof of the substantive offense required evidence of an actual mailing in execution of the scheme, an element not required to be proved to establish the conspiracy charge.

4. Petitioners' last contentions are that the trial judge committed prejudicial error (a) in admitting in evidence a certain colored map of the Brewster County area (Gov. Ex. 100, R. 672–673, 1110) which had been given to an investor-witness by one Kline, who was not named as a co-conspirator in the indictment, and (b) in instructing the jury that this evidence could be considered for the purpose of determining the question of the good faith or intention with which

the representations concerning the land were made (Br. 10–12, 37–42). Petitioners concede that the map was false and misleading in many respects (Br. 37), and they argue that it was improperly admitted against them because Kline was not named in the indictment and there was no evidence that they knew of the map or of Kline's activities.

The map in question was given to Miss Gunhild Benson by Kline in connection with a sale to her of a parcel of the Brewster County land (R. 672). Miss Benson testified that she paid the money for these purchases to Thigpen of Interstate (R. 663, 672), so that it is evident that Kline was a salesmen working for Thigpen in the enterprise involved here. This was evidence, therefore, from which the jury could reasonably have concluded that Kline, even though not named in the indictment, was a party to the scheme to defraud, with the result that his acts in furtherance of and within the contemplation of the scheme were chargeable to all of the conspirators. Cf. *Heflin* v. *United States,* 132 F. 2d 907, 909 (C. C. A. 5); *United States* v. *General Motors Corp.,* 121 F. 2d 376 (C. C. A. 7), certiorari denied, 314 U. S. 618; *Lewis* v. *United States,* 11 F. 2d 745, 747 (C. C. A. 6); *DeWitt* v. *United States,* 291 Fed. 995, 999 (C. C. A. 6), certiorari denied, 263 U. S. 714; *Isenhouer* v. *United States,* 256 Fed. 842 (C. C. A. 8). Moreover, it is clear from the record that the

colored map was of such a character that it could fairly be concluded that its use was within the reasonable contemplation of the scheme. Comparison of this map and its use with other maps utilized by petitioners (see p. 7, *supra*) supports this conclusion. This map was identical with the others except that certain areas were blocked off in color to show alleged holdings of major oil companies. Government Exhibit 5 (R. 274–275), which Thigpen gave to one investor-witness, was similiarly blocked off, although not in color. Furthermore, there was an abundance of evidence that petitioners, both in connection with their use of the other maps and orally, represented that various major oil companies had holdings around the area in question. The evidence as to Kline's activities, therefore, was admissible for the jury's consideration on the issue of the defendants' intent. Cf. *Clune* v. *United States,* 159 U. S. 590, 593; *Isenhouer* v. *United States,* 256 Fed. 842 (C. C. A. 8); *Pandolfo* v. *United States,* 286 Fed. 8, 18 (C. C. A. 7); *Osborne* v. *United States,* 17 F. 2d 246, 249 (C. C. A. 9); *Ridenour* v. *United States,* 14 F. 2d 888, 891 (C. C. A. 3).

CONCLUSION

The decision below is clearly correct, and the petition for a writ of certiorari presents no problems of importance or real conflict of decisions.

We therefore respectfully submit that it should be denied.

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